LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
[illegible] 8 [illegible]
JOHN F. DAVIS, CLERK

Supreme Court of the United States

October Term, 1965

No. 399

SARAH SMITH, as Administratrix of the Estate of JOHN C. SMITH, Deceased, and GEORGE THOMAS HOLLEY,

Petitioners,

v.

UNITED STATES OF AMERICA and MARINE TRANSPORT LINES INC., as Owners of the USNS POTOMAC,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

MARVIN SCHWARTZ,
233 Broadway,
New York, New York,

CALVIN W. BREIT,
500 Helena Building,
Norfolk, Virginia,

Attorneys for Petitioners.

DONALD E. KLEIN,
C. ARTHUR RUTTER, JR.,
Of Counsel.

INDEX

	PAGE
Argument	1
CONCLUSION	5

Table of Authorities

CASES:

Blanchard v. United States, 347 F. 2d 268 (Ct. Cl. 1965)	3
Jansen v. United States, 344 F. 2d 363 (Ct. Cl. 1965)	3
Johnson v. Emergency Fleet Corp., 280 U. S. 320 (1930)	2
Maryland, for the use of Levin v. United States, 381 U. S. 41 (1965)	2, 3

STATUTES & REGULATIONS:

10 U. S. C. § 2306(a)	2
32 C. F. R. 1.1401(e)	2
32 C. F. R. 1.1402	2

Supreme Court of the United States

October Term, 1965

No. 399

SARAH SMITH, as Administratrix of the Estate of JOHN C. SMITH, Deceased, and GEORGE THOMAS HOLLEY,
Petitioners,

v.

UNITED STATES OF AMERICA and MARINE TRANSPORT LINES INC., as Owners of the USNS POTOMAC,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

Argument

Contrary to the assertion on page 7 of the respondents' brief in opposition, the petitioners do not contend that Marine Transport Lines, Inc. was an "operating agent" or an agent of any other kind. In their brief the attorneys for the United States of America characterized Marine Transport Lines as an "operating agent" no less than eight times. This characterization, which is solely that of the attorneys for the United States, seems to have been in use by the Department of Justice since at least 1948, the year of the earliest of the Congressional Reports cited on page 8 of respondents' brief. Notwithstanding the age of the phrase, it does not in any way appear in the contract between

Marine Transport Lines, Inc. and the government, from which even the word "agent" is missing.

The question of agency was not presented to this Court in *Johnson* v. *Emergency Fleet Corp.*, 280 U. S. 320 (1930). Moreover, the language of 46 U. S. C. 745 which provides that the remedy against the United States is exclusive of any other action against the agent or employee of the United States, was in fact a limitation upon the rule announced in *Johnson* wherein the Court stated at 280 U. S. 327, "We conclude that the remedies given by the act are exclusive in all cases where a libel might be filed under it."

The brief for the respondents in opposition does not deny that the provisions of the contract between the United States of America and Marine Transport Lines were intended to promote, encourage and foster the American Merchant Marine in accordance with the Armed Services Procurement Regulations 32 C. F. R. §§ 1.1401(e) and 1.1402. Neither does the government contend that the General Military Law relating to procurement did not give the Secretary of Navy the authority to "make any kind of contract that he considers will promote the best interest of the United States". Title 10 U. S. C. § 2306. Consequently the government cannot imply that the provisions in the contract which recognize the right of the seamen to sue Marine Transport Lines are invalid.

The relationship of Marine Transport Lines to the national defense effort is not closer than that of the Civilian Caretakers of the National Guard for whose torts this Court ruled the United States was not responsible under the Federal Tort Claims Act. *Maryland, for the use of Levin* v. *United States,* 381 U. S. 41 (1965). Therein this Court ruled that the United States of America was not responsible for the actions of these Civilian Caretakers even though they were paid with federal funds, were required to

observe federal requirements in order to maintain their positions, and were employed to maintain federal property, 381 U. S. at 48. In *Levin,* the court relied in part upon the constant administrative practice of the Department of Defense to treat these civilian caretakers as state rather than federal employees. The administrative practice of the Department of the Navy and the United States of America in connection with the MSTS procurement contract prior to this litigation was to treat contractors such as Marine Transport Lines as other than "agents" under the Suits in Admiralty Act. The uniformity of the practice of the government and its contractors to allow civil suits to proceed against the contractor under the Jones Act is shown by the concluding statement in respondents' argument on page 10 of their brief wherein respondents recognize that this is the first appellate case involving the application of the exclusivity provision of the Suits in Admiralty Act. The practical interpretation of a contract by the parties themselves during performance is, of course, of great importance in resolving disputes involving contract interpretation. *Jansen* v. *United States,* 344 F. 2d 363 (Ct. Cl. 1965) and *Blanchard* v. *United States,* 347 F. 2d 268 (Ct. Cl. 1965).

Respondents concede as they must that seamen employed on board the vessels operated under contract are prejudiced by a two year as opposed to a three year statute of limitations. Moreover, the government has not even attempted to minimize the prejudice which will result to those seamen whose civil actions against Contractors have been pending for more than two years from the date of their injuries.

The number of vessels currently operated privately under the contract (30) is greater than the fleets of Grace Lines (27), Isthmian Lines (24), States Marine Lines (25), and Waterman Steamship Corp. (25); the number of vessels compares favorably with the size of the fleets of the

giants of American shipping, American Export-Isbrandtsen Lines (45), Lykes Brothers (49), Moore-McCormack Lines (50), and United States Lines (54).

The seamen who man these vessels are assigned by private employers in their customary manner (Smith-Holley Appendix Court of Appeals, 87, 91, 92). They received no warning of any type that they were to be treated differently on board the government owned vessels. The contract specifically provided "The officers and members of the crew shall be subject only to orders of the Master or Contractor. All personnel of the Contractor employed in the performance of work under this contract including the Master, other officers and crew members shall be employees of the Contractor at all times and not of the Government (Smith-Holley Supplementary Appendix Court of Appeals, 9).

More than fifty (50) pages of brief have been filed in this Court and the courts below by the attorneys for the United States; the government has not yet explained why, if the exclusive remedy of the seamen was to be against the United States of America under the Suits in Admiralty and Public Vessels Acts, the contract specifically provides that Marine Transport Lines was to be reimbursed for damages for death and personal injuries occurring to its seamen employees (Smith-Holley Supplementary Appendix Court of Appeals, 35, 37).

CONCLUSION

For the reasons set forth above and in the Petition heretofore filed, the Petition for Certiorari should be granted.

Respectfully submitted,

MARVIN SCHWARTZ,
233 Broadway,
New York, New York,

CALVIN W. BREIT,
500 Helena Building,
Norfolk, Virginia,

Attorneys for Petitioners.

DONALD E. KLEIN,
C. ARTHUR RUTTER, JR.,
Of Counsel.

END